In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 564.

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
United States Department of Labor,
Petitioner,

v.

THE GENERAL INDUSTRIES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY OF RESPONDENT TO REPLY BRIEF FOR PETITIONER.

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I.

IMPORTANCE OF THE ISSUE.

The Administrator seeks to minimize the importance of the question presented in the case with respect to the exempt or non exempt character of Respondent's employment of the three (3) Foremen Engineers. He says in effect that the issue is of no general importance. It is before this Court for decision only because the Administrator believed the issue to be of sufficient importance to justify his suit for a permanent injunction. Certainly the Administrator would not seek to impose such a drastic remedy upon the Respondent because of a desire to promote litigation or to use the Act for punitive purposes. Thus because the Respondent, like the Administrator, believed the issue to be of paramount importance, the case has reached this Court although only three (3) out of more than Seventeen Hundred (1,700) of Respondent's employees are involved

and the possible financial liability of Respondent to those three (3) employees is relatively trifling compared to the cost of the defense of the case.

And entirely apart from the belief of the parties as to the importance of the exemption issue, it is of grave importance to employers in general to have an authoritative decision by this Court on the test for determining the exempt or non exempt character of executive employment. There have been scores of cases in the lower Courts involving this question. The Administrator, apparently, has followed the course of "when in doubt file suit." There is, of course, no record of the many instances where the employer acceded to the Administrator's demands before suit was filed.

It is true that, particularly in questions involving the executive exemption, there is little or no reason for employers to treat their employees as exempt executives in order to avoid the financial burden of overtime. Or as stated another way by the Presiding Officer at the Hearings Preliminary to Redefinition of the Administrator's Regulations:

> "• • • The penalty payment requirement for overtime work in the case of persons truly employed in an executive capacity would not usually have any considerable effect in spreading employment because in many instances the executive's work can not be shared. • • •" (Vol. 2 C. C. H. Labor Law Service 31,319.)

But even though a penalty payment for overtime to executive employees would not place a great financial burden upon employers, their exemption from the Act is of importance to industry for many other reasons.

The most important of these reasons is the absolute necessity for free and flexible employment contracts between employers and executives untrammeled by rigid requirements of the Act designed to protect hourly workers from substandard labor conditions. The Report Recommendations of the Presiding Officer state further reasons

why it is important that the restrictions of the Act should not apply.

> "* * * More important, as justification for unlimited hours of work, the opportunities for promotion to higher executive positions are clearly greater for those who already occupy some type of executive position. These intangible advantages are normally, though not always accompanied by more tangible advantages such as paid vacation and sick leave. Still more important is the fact that executives have a greater security of tenure than almost any other group of workers. When a factory retains only a skeleton crew, the foreman is normally a member of that crew; and the other members of the executive hierarchy also tend to retain their positions. Thus even the lower paid executives enjoy certain prerogatives that may be given weight. * * *" (Vol. 2 C. C. H. Labor Law Service 31,319.)

In addition to the general exemption question there is an issue of importance presented by the facts of this particular case.

II.

THE RIGHT OF THE RESPONDENT TO CLASSIFY EMPLOYEES AS EXEMPT EMPLOYEES UNDER THE ACT WITHOUT HAVING THE CLASSIFICATION THWARTED BY A REFUSAL OR NEGLECT BY THE EMPLOYEES TO PERFORM THE DUTIES ASSIGNED.

The facts found by the District Court after weighing all of the evidence demonstrated that the Foremen Engineers are clearly exempt under the Act and the Regulations of the Administrator if, *in fact, they perform the duties assigned to them.* The Fifth Circuit Court of Appeals in *Allen v. Atlantic Company,* 145 Fed. 2nd 761 (1944) so ruled in a case presenting nearly identical facts.

The Administrator says, however, that it is immaterial whether or not the Foremen Engineers would have been exempt had they performed the duties assigned to them since the determining factor is what, in fact, such employees testify they did or did not do that determines their exempt

status under the Administrator's Regulations. It is significant in this respect that the Administrator does not quote from his Regulations to support this stand. Respondent has been unable to find any language in the Regulations dealing with the subject. But even if the Administrator's Regulations would so provide, the Respondent would challenge them for this is not the intent of the Act.

It is stated in the Act that its purpose is to eliminate labor disputes and other burdens upon the free flow of goods in commerce. The burdens upon the free flow of commerce would be greatly increased by this obvious inducement to insubordination.

The issue is important to employers in general for if an employee may convert himself from an exempt employee to a non exempt employee by testifying that he refused or neglected to perform the duties assigned to him there may be an avalanche of law suits by employees throughout the country seeking to take advantage of the situation. If successful in this regard, such employees would be entitled to a double allowance of overtime. This overtime would be computed on a compensation basis which is certainly more liberal than would have been paid had those employees been considered non exempt. There is nothing in the legislative history of the Act indicating an intent by Congress to establish such an inequity.

III.

CONCLUSION.

The reply brief of the Administrator is largely devoted to a discussion of the testimony which, he asserts, demonstrates that the findings of the District Court were clearly erroneous. Respondent believes that the uncontradicted facts support the conclusions of the District Court. The only conflict in the evidence was with respect to whether or not the Foremen Engineers performed their assigned duties after they signed the Agreement of July, 1944. The District Court was able to weigh the evidence after personal

observation of the witnesses. Respondent respectfully asserts that the judgment of the District Court in this regard should be upheld.

In conclusion, we submit that the issues presented by the exemption question are of paramount importance and should be authoritatively decided by this Court.

All of which is respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 564.—October Term, 1946.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, *v.* The General Industries Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 31, 1947.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

In a complaint filed in the District Court, petitioner charged that respondent was violating the Fair Labor Standards Act [1] by failing to pay some of its employees time and one-half for statutory overtime, as required by § 7 (a) of the Act, and asked an injunction against continued violation. Respondent denied the charge, and separately alleged that any of its employees not compensated in accordance with the requirements of § 7 (a) were exempt from the Act by § 13 (a).

The Court, without a jury, heard witnesses for both parties with respect to the compensation and status of three engineers in respondent's power plant. It made special findings of fact, concluded that these men were exempt employees, and entered judgment for respondent.[2] The Circuit Court of Appeals thought the evidence did not sustain the District Court's findings relative to the engineers' exempt status. But it thought that the District Court had also found the engineers' compensation to be in accordance with the Act. It decided

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

[2] *Walling* v. *General Industries Co.*, 60 F. Supp. 549.

that the evidence was adequate to this end, and affirmed the District Court's judgment.[3] We granted certiorari[4] to determine whether the ruling of the Circuit Court of Appeals was not inconsistent with this Court's decision on computation of overtime in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. On argument here, however, respondent continued to urge that the District Court was warranted in its findings as to the engineers' exempt status.[5] Having heard the argument and examined the record, we agree that it was. Therefore, we need not consider further the question of computation of overtime, and proceed only to state the considerations relevant to the particular ground of our decision.

There is no dispute as to the applicable law. Section 13 (a) exempts from the overtime provisions of the Act any person employed in an "executive capacity" as defined in regulations issued by the Administrator. The Regulations prescribe six conjunctive conditions to an executive capacity, which are set forth in the margin.[6] Respondent

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[3] *Walling* v. *General Industries Co.*, 155 F. 2d 711.

[4] —— U. S. ——.

[5] Respondent was entitled to make this contention here without filing a cross-petition for certiorari. *Langnes* v. *Green*, 282 U. S. 531, 538; *Public Service Commission of Puerto Rico* v. *Havemeyer*, 296 U. S. 506, 509.

[6] 29 Code Fed. Regs. § 541.1, 5 F. R. 4077 (Regulations of the Administrator, Wage and Hour Division, U. S. Dep't of Labor, Oct. 24, 1940, amended Jan. 17, 1942) provides as follows:

"Section 541.1.—Executive.

"The term 'employee, employed in a bona fide executive . . . capacity' in section 13 (a) (1) of the act shall mean any employee—

"(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

"(B) who customarily and regularly directs the work of other employees therein, and

"(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to

had the burden of proving the existence of these conditions, if it would rely on its defense that the engineers were exempt employees.[7]

There was evidence to the following effect. Respondent operates at Elyria, Ohio, a plant engaged in the production of small motors and plastic products. Part of this plant consists of a power-house containing a boiler room and engine room. In the former are four boilers. These supply the steam required to drive three large electrical generators which are the source of power for the entire plant, and to create the high steam-pressures and air-pressures employed in molding plastics. In the engine room, besides the generators, are compressors, engines, and other equipment. All this machinery, in both rooms, constitutes an interrelated and interdependent system. It must be carefully and skillfully tended at all times in order to maintain the power and pressure required for continuous 24-hour operation of the plant, to avoid damage to the tremendous investment in the machinery itself, and to guard against the fearful consequences of an explosion.

During the period covered by the evidence, the power-house was manned by the following personnel. At the top

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the advancement and promotion or any other change of status of other employees will be given particular weight, and

"(D) who customarily and regularly exercises discretionary powers, and

"(E) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and

"(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment."

[7] See *Helliwell* v. *Haberman*, 140 F. 2d 833, 834 (C. C. A. 2); *Fletcher* v. *Grinnell Brothers*, 150 F. 2d 337, 340-341 (C. C. A. 6); *Smith* v. *Porter*, 143 F. 2d 292, 294 (C. C. A. 8).

was the chief engineer, who apparently adhered to no precise duty-hours, but was customarily present most of the morning and afternoon and subject to call, in the event of an emergency, twenty-four hours a day. Directly under and responsible to him were the three "operating engineers" whose status is in issue. They worked consecutive eight or eight and one-half hour shifts, one of them being present in the powerhouse at all times. Finally, there were an unspecified number of firemen and coal-passers, who, collectively, were also on twenty-four hour duty.

The engineers in question were paid regular monthly salaries of more than $200 per month, for which they regularly worked six-shift weeks. They received sick leave, vacations with pay, bonuses, insurance, and pension rights usually reserved for supervisory employees.

The engineers were in charge of the powerhouse and performed the duties generally incident to direct supervision of a highly mechanized operation. Respondent's vice president and factory manager testified that they acted as foremen of the firemen and coal-passers. This testimony was corroborated by other facts. In July, 1944, two months before the complaint in this case was filed, the engineers signed agreements with respondent stating their desire "to be regarded as foremen, as in the past, with foremen privileges and continue on a salary basis." Three weeks later the International Brotherhood of Firemen, Oilers and Helpers abandoned a long-contested claim of right to represent the engineers, thereby formally recognizing their supervisory status. Indeed, the nature of the operations in the powerhouse was such that the immediate and continuous supervision of trained persons was indispensable, and there were concededly no other employees to give such supervision. The engineers were required to maintain constant observation of all machinery in the powerhouse, and to make

regular inspections and necessary repairs. In addition they were required to spend a small part of their time in oiling and cleaning the engines.

The District Court, having made findings substantially as stated above, proceeded to make additional findings of the existence of each of the facts on which an executive status, as defined by the Regulations, is made to depend.

We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. At the least, we think that in drawing such inferences the Court was not clearly wrong, and conclude that the findings should therefore have been left undisturbed.[8] The Circuit Court of Appeals' rejection of those findings cannot rest on the conflicting testimony of petitioner's witnesses. The District Court heard the witnesses, and was the proper judge of their credibility.[9]

Affirmed.

[8] Rule 52 (a), Federal Rules of Civil Procedure; *Lawson* v. *United States Mining Co.*, 207 U. S. 1, 12; *Butte & Superior Copper Co.* v. *Clark-Montana Realty Co.*, 249 U. S. 12, 30. See *District of Columbia* v. *Pace*, 320 U. S. 698, 701.

[9] Rule 52 (a), Federal Rules of Civil Procedure; *Adamson* v. *Gilliland*, 242 U. S. 350; *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 37, 38, 41.

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[March 31, 1947.]

Mr. Justice Rutledge, dissenting.

In my opinion the Circuit Court of Appeals correctly found that the evidence is not sufficient to sustain the findings upon which the District Court concluded that the operating engineers are exempt under § 13 (a) (1) of the Fair Labor Standards Act. It said, unanimously:

> "The District Court found as a fact that Stegman, Page and Spooner were employed as foremen or supervisors of the department, with power to supervise the work of firemen and coal-passers in the boiler-room; that they customarily and regularly directed the work of other employees in the department, and customarily exercised discretionary powers. We think these findings are not sustained by the evidence. The work done by the engineers was highly skilled mechanical work. While the machinery was vital to the plant, dangerous and complicated, its operation involved no exercise of discretion, but merely the proper application of the skilled engineering training which these men had received. Although the three engineers were responsible for the proper operation of the machinery during their shifts, and, as the factory manager testifies, 'in charge of management of the property,' none of them could

fire or hire or give orders to any man in the boiler-room. Latteman, the chief engineer, who was present at the plant during one shift and on call 24 hours a day and seven days a week, was in full charge of the department. While Latteman might act on information from Stegman, Page, or Spooner, during the period involved, orders emanated only from him. It is not shown that Stegman, Page, or Spooner ever made any recommendation concerning the change in status of the boiler-men. It was essential to have proper steam pressure in the boiler-room, but if the three engineers desired in this connection to secure action from the firemen and coal-passers, they had to secure an order from Latteman. This evidence is not contradicted." 155 F. 2d 711, 714.

An independent examination of the record confirms the Court of Appeals' conclusions. It discloses that on one or two occasions an operating engineer tried to give orders to firemen or coal passers in the boiler room, but in each instance those men refused to follow them and took their orders solely from Latteman. This falls far short at least of the regular and customary supervision required by §§ 541.1 (A) and (B) of the controlling regulations to make the exemption operative.

Since the Court does not reach other questions presented on the record, I express no opinion concerning them.

MR. JUSTICE BLACK and MR. JUSTICE MURPHY join in this dissent.